2013 WL 5993586 (Ind.App.) (Appellate Brief)
Court of Appeals of Indiana.

PERSONAL RESOURCE MANAGEMENT, INC. and Margaret A. Ditteon, Appellants,
v.
EVANSTON INSURANCE COMPANY, Appellee.

No. 84A01-1304-PL-157.
October 7, 2013.

Appeal from the Vigo Superior Court, Division 3
Trial Court Cause No. 84D03-1105-PL-003628
The Honorable, David R. Bolk, Judge

Brief of Appellee, Evanston Insurance Company

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*1 I. STATEMENT OF THE ISSUES

Whether the trial court correctly granted summary judgment to Evanston Insurance Company ("Evanston") where the undisputed evidence demonstrated that:

a. Appellants, Personal Resource Management, Inc. ("PRM") and Margaret A. Ditteon ("Ditteon") (collectively "PRM") knew of facts and circumstances that might have supported a claim by a client, made material misrepresentations of fact in the insurance application submitted to Evanston, and failed to notify Evanston as required by the Policies;

b. PRM sought coverage for professional services and wrongful conduct not included under the terms of the Evanston Policies;

c. PRM provided notice of a claim after expiration of the 2009 Policy and did not comply with the discovery clause requirements;

d. The claim asserted against PRM was not covered per the terms of the exclusions in the Evanston Policies;

e. PRM failed to demonstrate a claim for bad faith against Evanston.

II. STATEMENT OF THE CASE

Pursuant to Ind. Appellate Rule 46(B)(1), Evanston agrees with the Statement of the Case contained in the Appellants' Brief.

*2 III. SUMMARY OF FACTS

A. PRM Formation And Business Operations.

In 1990, Ditteon and her former partner Judy Eifert formed PRM. (Appendix of Appellee, p. 91).[1] PRM was formed to help individuals in Terre Haute pay bills. (AOA, p. 91). PRM focused on the "**elderly** market" and individuals over 65. (AOA, p. 92). PRM provided assistance with banking errands and paying bills. (AOA, p. 92). Ditteon became the sole owner of PRM in 1995 when she bought out her partner's interest. (AOA, p. 93). As the business progressed, the services provided to the **elderly** changed and expanded to include representation as a power of attorney, representation as a guardian, and if no other family member was available, representation as a personal representative of an estate. (AOA, p. 93). Finally, PRM also served as payee for individuals entitled to Social Security benefits. (Id.) As a guardian appointed by the court, PRM would serve as both a guardian of the person and a guardian of the person's financial affairs. (AOA, p. 94).

B. PRM's Pre-Existing Potential Claims.

1. 2006 Guardian Potential Claim.

In September of 2006, Ditteon contacted PRM's insurance agent, Valerie Kinnaman of Tatem & Associates to inquire about E&O coverage. (AOA, p. 200). David Tatem had served as PRM's agent for several years, and Kinnaman took over as PRM's agent in 2002. (AOA, pp. 196-97). Ditteon called Kinnaman due to a potential claim involving the failure to pay insurance coverage with respect to an individual over whom they were appointed guardian. (AOA, p. 200). *3 On March 11, 2008,

Kinnaman contacted Ditteon and indicated that the carrier was denying the claim, as the Policy did not provide coverage for the loss. (AOA, p. 201).

2. 2008 Mitchell Potential Claim.

In November of 2006, a guardianship proceeding was filed in the Parke Circuit Court under Case Number 61C01-0611-GU-22. (AOA, pp. 278, 385). PRM was appointed as guardian for Charles E. Mitchell and eventually was required to post a $2,000,000.00 bond. *(Id.)* Ditteon assigned Jan Riddle to serve as the case manager for Mr. Mitchell. (AOA, p. 95). In April of 2008, Mitchell died. (*Id.;* (AOA, pp. 278, 282, 385, 438).

In May of 2008, Ditteon discovered that Riddle had engaged in wrongful acts with respect to Mr. Mitchell's guardianship. (AOA, p. 100). Riddle embezzled funds from Mitchell. *(Id.).* As a result, PRM and Ditteon terminated Riddle's employment. *(Id.).*

An estate was opened for Mitchell on May 7, 2008. (AOA, pp. 282, 442). The Court appointed Ditteon/PRM as the personal representative of the supervised Estate of Mitchell in Vigo County under Case Number 84D03-0804-ES-03954. (AOA, pp. 282, 442). The guardianship case and all assets became part of the estate case. (AOA, pp. 278, 343, 346).

In May of 2010 Ditteon, resigned as the personal representative of the Mitchell Estate, after Mitchell's heirs filed a petition with the Vigo Superior Court seeking her removal from the Estate. (AOA, pp. 278, 343, 347).

C. PRM Insurance Application And Ditteon Misrepresentations.

On September 9, 2008, Ditteon asked her insurance agent, Kinnaman, about adding employee dishonesty coverage to PRM's Policy. (AOA, pp. 196, 201-02). Kinnaman advised that, due to the existence of a pending claim, they would be unable to obtain coverage. (AOA, pp. 201-02). Ditteon also inquired about professional liability coverage. (AOA, pp. 196-201-02). Kinnaman was unable to find coverage through any of Tatem's insurance carriers (AOA, p. 205). ***4** In December of 2008, Kinnaman was able to obtain a quote from JM Wilson for professional liability insurance. (AOA, pp. 202-03, 266). JM Wilson is a surplus lines broker. (AOA, pp. 202-204). Tatem used JM Wilson because the carriers they had contracts with would not write this business. (AOA, p. 205). JM Wilson brokered for surplus lines carriers and obtained a quote from Evanston, an authorized surplus lines company in Indiana. *(Id.).* However, on January 15, 2009, Ditteon indicated she could not afford the coverage at that time. (AOA, p. 203).

On or around June 26, 2009, Kinnaman contacted Ditteon and reviewed the prior PRM application for professional liability coverage to update the information so that it could be re-quoted for coverage. (AOA, pp. 204, 207-08). On July 10, 2009, Kinnaman attempted to relay the new quote obtained for PRM. (AOA, p. 204). Kinnaman eventually reached Ditteon and on July 15, 2009 Ditteon reviewed and signed the application for insurance coverage. (AOA, pp. 199, 204, 209-14, 250). The application represented that the only professional services performed by PRM were as follows:

“Case Managers - paying bills. They are individual guardians for people. The owner Marge, is the only person that signs checks and is the case manager.”

The claims history section of the application asked the following question:

“During the last five years, have there been any professional liability claims against the applicant, its predecessors, subsidiaries, affiliates, employees and/or against any other person or entity proposed for this insurance.”

PRM/Ditteon responded “No” to the question:

The application also asked the following question:

"Is(are) any person(s) or entity(ies) proposed for this insurance aware of any fact, circumstance or situation which might afford grounds for any claim, such as would fall under the proposed insurance?".

Again, Ditteon and PRM responded "No."

(AOA, pp. 199, 204, 209-14).

***5** The application further included the following language:

NOTICE TO THE APPLICANT - PLEASE READ CAREFULLY

No fact, circumstance or situation indicating the probability of a claim or action for which coverage may be afforded by the proposed insurance is now known by any person(s) or entity(ies) proposed for this insurance other than that which is disclosed in this application. It is agreed by all concerned that if there be knowledge or any such fact, circumstance or situation, any claim subsequently emanating therefrom shall be excluded from coverage under the proposed insurance.

The policy applied for is SOLELY AS STATED IN THE POLICY, if issued, which provides coverage on a "CLAIMS MADE" basis for ONLY THOSE CLAIMS THAT ARE FIRST MADE AGAINST THE INSURED DURING THE POLICY PERIOD, unless the extended reporting period option is exercised in accordance with the terms of the policy. The policy has specific provisions detailing claim reporting requirements.

(Id.).

D. Issuance of Evanston 2009 Policy and 2010 Renewal Policy.

Evanston issued a policy of insurance to PRM for the policy period covering July 15, 2009 to July 15, 2010 (the "2009 Policy"). (AOA, pp. 198, 216-49). The 2009 Policy was forwarded to PRM by Kinnaman on or around August 21, 2009. (AOA, pp. 206, 215). Kinnaman's transmittal letter to PRM emphasized "your policy may contain certain conditions, exclusions or limitations, so it is important for you to read it." *(id.).* The 2009 Policy contained a similar notice. (AOA, p. 216). The application signed by Ditteon was attached to and made a part of the Policy. (AOA, pp. 198, 216, 223, 244).

The 2009 Policy was thereafter renewed, as Policy No. EO-843441, for the policy period from July 15, 2010 to July 15, 2011, with a retroactive date of July 15, 2009 (the "2010 Policy"). (AOA, pp. 279, 413). The July 15, 2009 application also was attached and made a part of this Policy. (Id.).

***6** The 2009 Policy and 2010 Policy were issued on a "Claims Made and Reported" basis with liability limits of $500,000.00 per claim and $1,000,000.00 in aggregate. (AOA, pp. 273, 279, 305, 413).

E. The Pertinent Policy Provisions

In relevant part, the 2009 Policy and 2010 Policy each include the following provisions:

Service and Technical Professions Professional Liability Insurance Policy

THIS IS A CLAIMS MADE AND REPORTED POLICY. PLEASE READ IT CAREFULLY.

In consideration of the premium paid, the undertaking of the Named Insured to pay the Deductible as described herein and in the amount stated in the Declarations, *in reliance upon the statements in the application attached hereto and made a part hereof*

and the underwriting information submitted on behalf of the Insured, *and subject to the terms, conditions and limitations of this policy*, the Company and the Insured agree as follows:

INSURING AGREEMENT

A. The Company shall pay on behalf of the Insured all sums in excess of the Deductible amount stated in Item 6. of the Declarations, which the Insured shall become legally obligated to pay as Damages as a result of a *Claim first made against the Insured during the Policy Period* or during the Extended Reporting Period, if exercised, and reported to the Company during the Policy Period or the Extended Reporting Period, if exercised, or within sixty (60) days after the expiration date of the Policy Period or Extended Reporting Period, if exercised,

by reason of:

1. *a Wrongful Act;* or

2. a Personal Injury; *in the performance of Professional Services* rendered or that should have been rendered by the Insured or by any person or organization for whose Wrongful Act or Personal Injury the Insured is legally responsible,

provided:

***7** (i) *the Wrongful Act* or Personal Injury *happens during the Policy Period* or on or after the Retroactive Date stated in Item 7. of the Declarations and before the end of the Policy Period; *and*

(ii) *prior to the effective date of this policy the Insured had no knowledge of such Wrongful Act or Personal Injury or any fact, circumstance, situation or incident which may have led a reasonable person in the Insured's position to conclude that a Claim was likely.*

DEFINITIONS

A. **Claim** means the Insured's receipt of:

1. a written demand for money damages or remedial Professional Services involving this policy; or

2. the service of suit or institution of arbitration proceedings against the Insured;

provided, however, Claim shall not include Disciplinary Proceeding.

J. **Professional Services** means those services stated in Item 4. of the Declarations rendered for others for a fee.

M. **Wrongful Act** means any negligent act, error or omission in Professional Services.

THE EXCLUSIONS

This policy does not apply to any Claim:

O. *based upon or arising out of* any conversion, *misappropriation*, commingling of or defalcation *of funds* or property;

***8** P. based upon or arising out of any inability or failure of any party to pay or collect monies or to collect or pay federal, state, county or local tax, including, but not limited to, income tax, sales tax or property tax;

R. *based upon or arising out of the: (1) preparation of a financial statement, if a compilation, review or audit; or* (2) performance of any analytical analysis for the purpose of preparing a financial statement, if a compilation, review or audit.

CLAIMS

B. **Discovery Clause.** If during the Policy Period, the Insured first becomes aware of a specific Wrongful Act or a Personal Injury which is reasonably expected to result in a Claim within the scope of coverage of this policy, then the Insured may provide written notice as stated in Item 12. of the Declarations to the Company containing the information listed below. If such written notice is received by the Company during the Policy Period, then any Claim subsequently made against the Insured arising out of such Wrongful Act or Personal Injury shall be deemed for the purpose of this insurance to have been first made on the date on which such written notice is received by the Company

It is a condition precedent to the coverage afforded by this Discovery Clause *that written notice be given* to the Company *containing the following information:*

1. the description of the specific Wrongful Act or Personal Injury;

2. the date on which such Wrongful Act or Personal Injury took place;

3. the injury or damage which has or may result from such Wrongful Act or Personal Injury;

4. the identity of any injured persons and/or organization subject to such injury or damage; and

5. the circumstances by which the Insured first became aware of such Wrongful Act or Personal Injury.

***9 OTHER CONDITIONS**

B. **Representations:** By acceptance of this policy, the Insureds agree as follows:

1. that the information and statements contained in *the application(s) are* the basis of this policy and are to be considered as incorporated into and constituting a *part of this policy;* and

2. that *the information and statements contained in the application(s) are their representations, that they shall be deemed material to the acceptance of the risk or hazard assumed by the Company* under this policy, and that *this policy is issued in reliance upon the truth of such representations.*

DEFENSE, SETTLEMENTS AND CLAIM EXPENSES

A. **Defense, Investigation and Settlement of Claims:**

1. The Company shall have the right and duty to defend and investigate any Claim to which coverage under this policy applies pursuant to the following provisions:

(a) Claim Expenses incurred in defending and investigating such Claim shall be a part of and shall not be in addition to the Limits of Liability stated in Item 5. of the Declarations. Such Claim Expenses shall reduce the Limits of Liability and shall be applied against the Deductible. The Company shall have no obligation to pay any Damages or to defend or continue to defend any Claim or to pay Claim Expenses after the Limits of Liability stated in Item 5. of the Declarations have been exhausted by payment(s) of Damages and/or Claim Expenses.

(AOA, pp. 273, 279, 305-33, 413-37; App., pp. 96-143) (emphasis added).

Upon renewal, the 2010 Policy added Endorsement 3, which states:

***10 RELIANCE ON APPLICATION PROVISION**

In consideration of the premium paid, it is hereby understood and agreed that the policy is amended as follows:

1. Section Conditions Precedent is deleted and replaced as follows:

In consideration of the premium paid, the undertaking of the Named Insured to pay the Deductible as described herein and in the amount state in the Declarations, *in reliance upon the statements in the application attached to [the 09-10 Policy] and also made a part hereof and the* underwriting information submitted on behalf of the Insured, and subject to the terms, conditions and limitations of this policy, the Company and the Insured agree as follows:

2. Section Other Conditions B, Representations, is deleted and replaced as follows:

B. **Representations:** By acceptance of this policy, the Insureds agree as follows:

1. *that the information and statements contained in the application(s) for [the 09-10 Policy],* a copy of which is attached hereto, are the basis of this policy and *are to be considered as incorporated into and constituting a part of this policy;* and

2. *that the information and statements contained in the application(s) are their representations, that they shall be deemed material to the acceptance of the risk or hazard assumed by the Company under this policy,* and that this policy is issued in reliance upon the truth of such representations. (Emphasis added). (Evanston Answer, Ex. A and B). (AOA 419).

In the Declarations section of the Evanston Policies, item 4. “Professional Services” is listed on each Policy as “Court Appointed Guardians.” (AOA, pp. 273, 279, 306, 414) (emphasis added).

F. PRM Notice Of Potential Mitchell Claim And Evanston's Response.

On June 17, 2010, PRM, by counsel, sent a letter to Evanston advising of a “potential claim.” (AOA, pp. 271, 288). Evanston had Glenn Fisher, a senior claims attorney with Markel Service, Incorporated, review the claims submitted by PRM's counsel. (AOA, pp. 269-70). ***11** Markel is the claims service manager for Evanston. (AOA, p. 270). Fisher reviewed the letters, file materials, the policies, the application and the lawsuits. (AOA, pp. 272-81). On July 15, 2010, Evanston issued a response to counsel's June 17, 2010 letter. (AOA, pp. 276-77, 334-41; App., pp. 160-186). Evanston agreed that “no Claim arising out of the Insured's Professional Services (as those terms are described by the policy) has been made against the insured at this point in time.” (AOA, p. 339). As a result, no insurance coverage was triggered. (AOA, p. 277). Evanston, however, advised PRM and its counsel of the insured's need to provide additional information to Evanston if it wished to invoke coverage under the Discovery Clause of the 2009 Policy. (AOA, pp. 276-77, 280, 334-41). PRM and its counsel never provided that requested information. (AOA, pp. 278, 280, 275-83).

G. PRM's Notice Of The Mitchell Guardianship And Mitchell Estate Claims And Evanston's Coverage Denial Letter.

On October 13, 2010, PRM's counsel tendered for defense and indemnity to Evanston a complaint and other filings in an action entitled “First Financial Bank, et al v. Personal Resource Management, Inc., et al.” in the Parke Circuit Court under Cause No. 61C01-0611-GU-22 (the “Mitchell Guardianship”). (AOA, pp. 278, 385). This lawsuit asserted claims related to the handling of Mitchell's assets and the wrongful conduct of Jan Riddell. As noted previously, Ditteon was aware of these wrongful acts

in May of 2008. (AOA, p. 100). Ditteon did not disclose this to Evanston in PRM's application. (AOA, pp. 199, 208, 209-14; AOA, pp. 273, 325-29)

On October 21, 2010, PRM's counsel forwarded to Evanston a Complaint for Damages filed in an action entitled "First Financial Bank, et al. v. Margaret A. Ditteon, et al." in the Vigo Superior Court under Cause No 84D03-0804-ES-3954, (the "Mitchell Estate"), and requested that Evanston assume the defense and indemnity for PRM and Ditteon in that matter. (AOA, pp. ***12** 278, 343). As noted previously, PRM and Ditteon did not disclose they provided personal representative services for estates of deceased clients in the application for insurance. (AOA, pp. 199, 208, 209-14). The Mitchell Guardianship was transferred from the Parke Circuit Court and made part of the Mitchell Estate. (AOA, pp. 33, 88, 278, 346).

On October 29, 2010, after investigation, Evanston issued a denial of coverage letter with respect to the Mitchell Estate Claim. (AOA, pp. 278, 275-83).

H. PRM's Notice Of Mitchell Lawsuit And Evanston's Coverage Denial Letter.

On February 24, 2011, the PRM's, by counsel, submitted to Evanston a Complaint for Damages filed in an action entitled "First Financial Bank, et al. v. Ditteon, et al.", in Vigo Superior Court under Cause No. 84D03-1011-PL-9720 (the "Mitchell Lawsuit"), which was tendered for defense and indemnification. (AOA, pp. 282-83, 438). The Mitchell Estate Claim and Mitchell Lawsuit were consolidated for trial by Special Judge Matthew L. Headley. (AOA, pp. 37, 49-52, 72-73)

On March 7, 2011, after Fisher reviewed and investigated the claim, Evanston issued a declination of coverage letter with respect to the tenders made by PRM in the Mitchell Lawsuit under Cause No. 84D03-1011-PL-9720. (AOA, pp. 283, 486-94). Evanston denied coverage for the Claims made by PRM in the actions filed by Mitchell on each of the following grounds:

a. PRM's requests for coverage does not fall within the Insuring Agreements of either the 2009 Policy or 2010 Renewal Policy.

b. PRM did not comply with the "Discovery Clause" for the 2009 Policy.

c. There are no covered "Claims" for "Wrongful Acts" in the performance of "Professional Services," as those terms are defined in the Policies.

***13** d. PRM failed to disclose information of Wrongful Acts in their application for the Policies.

e. There was no coverage for Claims made in the underlying actions because the Wrongful Acts occurred before the retroactive date for the Policies.

f. No coverage existed for the Claims made in the underlying actions because PRM had knowledge of the Wrongful Acts.

g. No coverage existed for the Claims made against PRM in the underlying actions on the ground that Exclusion "0" applied.

h. No coverage existed for the Claims made against PRM in the underlying actions on the ground that Exclusion "P" applied.

i. No coverage existed for the Claims made against PRM in the underlying actions on the ground that Exclusion "R" applied. (AOA, pp. 283,486; App. p. 91-92).

IV. SUMMARY OF ARGUMENT

The trial court correctly rejected PRM's attempt to obtain coverage for matters that existed before issuance by Evanston of the claims made and reported insurance policies. PRM knew that a claim was likely to arise out of their handling of the

guardianship and estate of Charles Mitchell. PRM does not dispute this fact. Despite this knowledge, PRM and Ditteon withheld the information and misrepresented to Evanston that they had no knowledge of facts which might lead to a claim. Evanston issued "claims made and reported" insurance policies which precluded coverage for matters that were known and not disclosed. The policies also were limited to "Professional Services" provided by PRM as "Court Appointed Guardians" and claims first made and reported within the dates of the policies.

***14** Here, the claims forwarded by PRM were not covered by the terms of the policies and also were expressly excluded. The factual circumstances supporting the claims by the guardianship and estate of Charles Mitchell first arose from PRM's services prior to the July 15, 2009 retroactive date of the Policies. The embezzlement by PRM's employee and the failure to collect, account and safeguard Mitchell's assets all first occurred or happened and were known to PRM before issuance of the Evanston policies. PRM withheld this information from Evanston. Because of the omissions and misrepresentations made by PRM in the application, and under the express terms of the policies, no coverage existed for claims involving Mitchell. This conclusion is consistent with the known loss doctrine followed by Indiana courts. Therefore, the trial court correctly granted summary judgment in favor of Evanston and against PRM and Ditteon.

PRM and Ditteon also asserted a claim for bad faith and punitive damages. The trial court correctly concluded that PRM failed to establish this claim with clear and convincing evidence. Evanston had a right to reasonably disagree. Here, Evanston had a valid (or, at minimum, a well principled) basis for denying coverage and acted reasonably and without bad intent. The trial court also properly determined that a bad faith claim cannot be established as a matter of law based on an allegedly negligent investigation. Furthermore, since Evanston was correct in the denial of coverage, no basis existed for considering this claim, because bad faith cannot be established unless coverage first exists. The evidence demonstrated not just a reasonable good faith basis for Evanston's denial, but also established no coverage existed. Therefore, the trial court correctly granted summary judgment to Evanston on the bad faith claim.

***15** V. STANDARD OF REVIEW

Whether the appeal is from the grant or denial of a motion for summary judgment, this Court employs a de novo standard of review. *See, e.g., Univ. of S. Ind. Found. v. Baker,* 843 N.E.2d 528, 531 (Ind. 2006). Although this Court engages in de novo review, "[a] trial court's grant of summary judgment is clothed with a presumption of validity, and the appellant bears the burden of demonstrating that the grant of summary judgment was erroneous." *Reising v. Guardianship of Reising,* 852 N.E.2d 644, 647-48 (Ind. Ct. App. 2006). Additionally, although "[t]he trial court's findings and conclusions upon entry of summary judgment are not binding upon our review," "they offer valuable insight into the trial court's rationale for its review and thus facilitate appellate review." *McEntee v. Wells Fargo Bank, N.A.,* 970 N.E.2d 178, 182 (Ind. Ct. App. 2012). However, this Court is not limited to the trial court's reasons for summary judgment. *Corry v. Jahn,* 972 N.E.2d 907, 912 (Ind. Ct. App. 2012) *trans. denied.* Rather, the Court "will affirm the summary judgment if it is sustainable upon any theory or basis found in the record." *McDonald v. Lattire,* 844 N.E.2d 206, 211 (Ind. Ct. App. 2006).

VI. ARGUMENT

A. General Principles For Construction and Insurance Contracts.

The interpretation of an insurance policy is a question of law. Meridian Mut. Ins. Co. v. Purkey, 769 N.E.2d 1179, 1182 (Ind. Ct. App. 2002). In interpreting such a document, courts must keep in mind that insurance policies are subject to the same rules of interpretation as other contracts. *Commercial Union Ins. v. Moore,* 663 N.E.2d 179, 180 (Ind. Ct. App. 1996). Accordingly, a court cannot extend coverage beyond that provided for in the policy and cannot rewrite the clear unambiguous language of the policy. *Sell v. United Farm Bureau Family Life* ***16** *Ins. Co.,* 647 N.E.2d 1129, 1131-32 (Ind. Ct. App. 1995). Under Indiana law, the burden is on the insured to prove that its claims fall within the coverage provisions of an insurance policy. Once the insured satisfies that burden, it is left to the insurer to prove the applicability of an exclusion. *Erie Ins. Grp. v. Sear Corp.,* 102 F.3d 889, 892 (7th Cir. 1996) (applying Indiana law).

Insurance companies are free to limit their liability in a manner not inconsistent with public policy, and plainly expressed exceptions, exclusions and limitations are entitled to construction and enforcement as expressed. *Allstate Ins. Co. v. Boles*, 481 N.E.2d 1096, 1098 (Ind. 1985). Thus, courts should adhere to the principle that an insurance company is "free to determine by its contract what risks it is undertaking to insure, provided policy provisions do not violate statutory mandates or are against public policy." *Cincinnati Ins. Co. v. Mallon*, 409 N.E.2d 1100, 1103 (Ind. Ct. App. 1980).

When interpreting an insurance policy, a court's goal is to ascertain and enforce the parties' intent as manifested in the insurance contract. *Briles v. Wausau Ins. Cos.*, 858 N.E.2d 208, 213 (Ind. Ct. App. 2006). A court construes the insurance policy as a whole and considers all of the provisions of the contract and not just the individual words, phrases or paragraphs. *Id.* If the language is clear and unambiguous, a court must give the language its plain and ordinary meaning. *Id.* An ambiguity exists where a provision is susceptible to more than one interpretation and reasonable persons would differ as to its meaning. *Id.* However, an ambiguity does not exist merely because the parties proffer differing interpretations of the policy language. *Id.* Moreover, a split of authority on the meaning of similar contract terms does not necessarily mean that those terms are ambiguous. *Allgood v. Meridian Sec. Ins. Co.*, 836 N.E.2d 243, 248 (Ind. 2005). A disagreement among courts as to the meaning of a particular contractual provision is evidence that an ambiguity may exist, but a division of authority is only evidence of ambiguity. *Id.* Such a ***17** disagreement does not establish conclusively that a particular clause in an insurance policy is ambiguous, and Indiana courts are not obliged to agree that those courts that have reached different results have read the policy correctly. *Id.*

A court must accept an interpretation of the contract language that harmonizes the provisions, rather than one that supports conflicting versions of the provisions. *Briles*, 858 N.E.2d at 213. Additionally, the power to interpret contracts does not extend to changing their terms and a court will not give insurance policies an unreasonable construction to provide additional coverage. *Id.*

B. Principles Applicable To Claims Made Insurance Policies. [2]

A claims made and reported policy provides coverage for all claims "first made" against the insured and reported in writing during the policy period. "[A] predicate to claims-made coverage is that the insured neither knew of a claim nor could have reasonably foreseen that a known circumstance, act or omission might reasonably be expected to be the basis of a claim or suit." 5 Ronald E. Mallen and Jeffrey M. Smith, *Legal Malpractice* § 35:14, at 84 (2008 ed.) ("Mallen"). An insurer issuing a claims made policy acts reasonably in not providing coverage for alleged wrongful acts that an insured knew or should have known might be the basis of a claim before the policy was issued. Indeed, "losses which exist at the time of the insuring ***18** agreement, or which are so probable or imminent that there is insufficient 'risk' being transferred between the insured and the insurer, are not proper subject of insurance." 7 *Couch on Insurance* § 102:8 (3d ed. 2009). *See also, Warnock v. Office of Servicemembers' Group Life Ins.*, 2004 WL 1087364, at *3 (S.D. Ind. Apr. 28, 2004) ("No insurer would issue a fire insurance policy on a house that has already burned down or a life insurance policy on a person who has already died."); *Rohm & Haas Co. v. Cont'l Cas. Co.*, 566 Pa. 464, 781 A.2d 1172, 1176 (2001) (Insurance is rooted in the "fundamental requirement of fortuity").

As addressed by Indiana courts a "claims made" insurance policy is materially different from an "occurrence" insurance policy. *Paint Shuttle, Inc. v. Cont'l. Cas. Co.*, 733 N.E.2d 513, 521-22 (Ind. Ct. App. 2000) *trans. denied. See also, Koransky, Bouwer & Poracky P.C. v. The Bar Plan Int'l Ins. Co.*, 2012 WL 443957, at *8 (N.D. Ind. Feb 8, 2012) *affirmed*, 712 F.3d 336 (7th Cir. 2013). Under a "claims made" policy: "[T]he duty to notify an insurance company of potential liability is a condition precedent to the company's liability to its insured. When the facts of the case are not in dispute, what constitutes proper notice is a question of law for the courts." *Paint Shuttle*, 733 N.E.2d at 520 (noting the failure of law firm to provide proper notice of claim precluded coverage). (Citation omitted). Under a "claims made" policy, notice is a basic term of the policy and delay cannot be excused. *Id.* Enforcement of the claim notice provision validates the freedom to contract and gives the insurer the opportunity to underwrite or investigate claims. *Id.* at 520-21. Under a "claims made" policy, an insurer can exclude coverage for claims that are based on conduct that occurred before a policy was issued and was known to have the potential for a claim. *Koransky*, 712 F.3d at 342-43; *Truck Ins. Exec. v. Ashland Oil, Inc.*, 951 F.2d 787, 791 (7th Cir. 1992); *Gen. Ins. Co. of Am. v. Boyd*, 2002 WL 1610948 at 5-6 (S.D. Ind. July 9,2002); ***19** *Worth v. Tamarack Am.*, 47 F.Supp.2d 1087, 1096 (S.D. Ind. 1999) *aff'd*

210 F.3d 377 (7th Cir. 2000). By limiting the exposure period, the insurer also avoids the increased risks associated with future inflation, the prospect for increasing jury awards, and unanticipated changes in the substantive law. Ostrager and Newman at 162. Thus, premiums on claims-made policies can be set at lower rates than comparable coverage under an occurrence form. *Id.*

C. The Trial Court Correctly Determined that PRM's Misrepresentations, Omissions of Information and the "Known Loss Doctrine" All Precluded Coverage for The Mitchell Suits.

PRM and Ditteon and do not dispute knowledge of Riddle's embezzlement of funds from the Mitchell Guardianship. Ditteon admitted she knew of the facts which might afford grounds for a claim by Mitchell against PRM as early as May of 2008. (AOA, p. 100). PRM and Ditteon also do not and cannot dispute that in early 2006 a claim was submitted by PRM regarding their failure as guardians to pay insurance for another person, but misrepresented in the July 2009 application to Evanston that there were no professional liability claims over the prior five (5) years and no factual circumstance that might support a claim. (AOA, pp. 199-01, 204, 209-14). These undisputed facts were known to PRM and Ditteon well before Ditteon signed the application for insurance with Evanston in July of 2009.

PRM and Ditteon attempt to sidestep the undisputed facts and the legal analysis precluding coverage by mischaracterizing Evanston's denial of coverage as an attempt to rescind or void the 2009 and 2010 policies. PRM and Ditteon seek to engraft an obligation to refund insurance premiums paid by PRM based on this mischaracterization; however, PRM's attempt misapplies and misstates Indiana law.

Contrary to the suggestion made by PRM and Ditteon, a denial of coverage does not require an insurance company to rescind a policy and refund premiums. Rather, an insurance ***20** company must refund premiums, only if it attempts to rescind a policy *ab initio. See e.g., Koransky,* 712 F.3d at 344-45 (upholding trial court's decision voiding coverage for claim without rescinding the policy, because where insured makes material misrepresentation, an insurer may choose between one of two remedies - either void the policy in its entirety and return both parties to the status quo ante, or affirm the policy and seek relief via a declination of coverage). *See also, Worth,* 47 F.Supp.2d at 1099-1100 (holding language of "claims made" policy gave insurer right to decline and exclude coverage and defense for potential claim not disclosed in application by insured).

In Koransky, the district court, applying Indiana law, granted summary judgment to the insurance carrier, because the law firm failed to notify the insurance carrier of facts that the firm's attorneys knew or should have known could lead to a claim. The district court concluded that claims made thereafter by the client were not covered under the terms of the policy. The district court did not grant the insurance carrier's rescission request. On appeal, the United States Court of Appeals for the Seventh Circuit affirmed the district court's grant of summary judgment under the terms of the policy and determined that there was no need to address the alternate theory of rescission. *Koransky,* 712 F.3d at 345.

Here, Evanston properly denied coverage and defense to PRM and Ditteon for the Mitchell litigation. (AOA, pp. 276-78, 283, 334-42, 375-83, 486-94). Evanston's denial did not seek to rescind, and accordingly, Evanston was not required to refund premiums to PRM. *Id. See also, Am. Special Risk Mgmt. Corp. v. Cahow,* 286 Kan. 1134, 192 P.3d 614, 623 (2008) (holding insurer could deny coverage based on policy/application exclusion for undisclosed or misrepresented risks and was not required to void or rescind policy). If a claim had been made under the policies for a client other than Mitchell or his heirs, coverage may have existed under ***21** the policies. However, that did not occur. Therefore, Evanston did not have to refund premiums and the trial court properly granted summary judgment in favor of Evanston.

PRM and Ditteon next suggest that the misrepresentations regarding possible claims by Mitchell should not preclude coverage, because there is no evidence that the information was "material" to the issuance of policies and coverage. (Appellants' Brief, pp. 23-24). This argument is trumped by the contractual provisions of the Policies. Indeed, the undisputed evidence demonstrated that PRM agreed and admitted any misrepresentation in the policy application was material and would be excluded from coverage. The application signed by Ditteon provided, in part, as follows:
NOTICE TO THE APPLICANT - PLEASE READ CAREFULLY

No fact, circumstance or situation indicating the probability of a claim or action for which coverage may be afforded by the proposed insurance is now known by any person(s) or entity(ies) proposed for this insurance other than that which is disclosed in this application. ***It is agreed by all concerned that if there be knowledge or any such fact, circumstance or situation, any claim subsequently emanating therefrom shall be excluded from coverage under the proposed insurance.***

The Policy applied for is SOLELY AS STATED IN THE POLICY, if issued, which provides coverage on a "CLAIMS MADE" basis for ONLY THOSE CLAIMS THAT ARE FIRST MADE AGAINST THE INSURED DURING THE POLICY PERIOD, unless the extended reporting period option is exercised in accordance with the terms of the Policy. The Policy has specific provisions detailing claim reporting requirements. (AOA, pp. 199, 204,209-14) (emphasis added).

The 2009 Policy states it was made "in reliance upon the statements in the application." (App., p. 103). Also, the 2010 Policy provided, in part, as follows:
B. **Representations:** By acceptance of this policy, the Insureds agree as follows:

2. that *the information and statements contained in the application(s) are their representations, that they shall be deemed material to the acceptance of the risk of hazard assumed by the Company* under this policy, and that *this policy is issued in reliance upon the truth of such representations.* (Evanston Answer, Ex. A and B) (emphasis added).

***22** (App., p. 126). Clearly, these undisputed facts indicate the application information was "material" and by the terms of the Policy would lead to a denial of coverage.

PRM and Ditteon lastly attempt to distinguish the known loss doctrine cases relied upon by the trial court. (Appellants' Brief, pp. 24-25). Their efforts, however, fall short and do not support reversal. The known loss doctrine provides a party cannot obtain insurance coverage for a loss that is known to exist at the time an insurance application is submitted. *See e.g.*, *Gen. Housewares Corp. v. Nat'l Sur. Corp.*, 741 N.E.2d 408, 413 (Ind. Ct. App. 2000). Although Gen. Housewares involved an environmental insurance policy loss in which the known loss principles were an implied part of the policy, the principles stated therein are not limited to environmental insurance coverage claims. *Id.* at 415 (stating that the known loss doctrine is "applicable to all insurance contracts, unless expressly stated otherwise").

Here, known loss principles are expressly and unambiguously stated in the Policies. Despite the clear application of this doctrine to the present matter, PRM and Ditteon argue that the court should not apply the doctrine, because PRM allegedly did not have knowledge of all the potential permutations of the claims that could be pursued by Mitchell when the application was signed. The argument fails to provide a valid basis for avoiding the doctrine either as implied by common law or as compelled by express policy language. *Id.* at 416 (noting that the known loss doctrine applied despite insured's argument that "it was not aware (and in some cases still not aware) of the full extent of its liability"). *See also*, *Cahow*, 192 P.3d at 622 (upholding trial court's determination that language of policy and application precluded coverage, because insured failed to disclose circumstances that objectively might have supported a potential claim). As the Kansas Supreme Court explained this insurance concept,
***23** Often, the exclusion for known facts, circumstances, or situations is referred to as the "known loss," "fortuity," or "loss-in-progress" doctrine. The doctrine "embod[ies] the concept that one may not obtain insurance for a loss already in progress, or for a loss that the insured either knows of, planned, intended, or is aware is substantially* 1144 certain to occur." *43 Am.Jur.2d, Insurance § 479;* see 3 Bjorkman, Leitner & Simpson, Law & Prac. of Ins. Coverage Litig. § 35:9 (2008) ("When a policyholder knew, or reasonably should have known, of a *substantial probability* of loss prior to the inception of an insurance policy, that policy should not cover the loss."); Jerry & Richmond, Understanding Insurance Law § 63, pp. 437-38 (4th ed.2007). Simply put, whether enforced through policy language or through a rescission of the insurance policy, an insured cannot obtain coverage for the risk of a known loss.

(Id.).

PRM and Ditteon knew a claim could arise out of these acts and omissions with respect to their client Mitchell. (AOA, p. 100). They claim, however, they did not know other problems with the guardianship or estate representation existed. This argument must be rejected. As noted in *Gen. Housewares:*

> The existence of liability can be known without the full extent of liability being fixed. For example, if one negligently injures a pedestrian with one's automobile, one's liability is substantially certain. However, it may be months before the dollar amount of liability is certain, and the known loss doctrine bars purchasing insurance after the accident. An insured's liability need not be fixed to a monetary certainty; if the known liability has occurred or is substantially certain to occur, the known loss doctrine bars coverage.

Id. at 417.

Here, PRM and Ditteon knew its employee stole from the Mitchell guardianship. They did not properly monitor that employee and did not seek to recoup funds for the client, Mitchell. Suit was filed by Mitchell's heirs for all of these errors and the application submitted to Evanston did not disclosure such facts. As such, the common law known loss doctrine and the express policy language clearly applied and precluded coverage as to the Mitchell litigation. *Gen. Housewares,* 741 N.E.2d at 417 ("An insured's liability need not be fixed to a monetary certainty; if the known liability has occurred or is substantially certain to occur, the known loss ***24** doctrine bars coverage."). *See also, Worth,* 47 F.Supp.2d at 1096 (applying an objective standard and asking whether a reasonable attorney in insured's position would have believed a professional duty was breached before the effective date of the policy.); *see also, Cahow,* 192 P.3d at 622 (known loss enforced through either written provisions of policy or implied by law).

PRM and Ditteon next suggest that several other issues were raised by the Mitchell lawsuits for which they had no knowledge. (Appellants' Brief, p. 24). This argument should be rejected for several reasons.

First, a review of each Complaint indicates that the factual allegations are incorporated by reference throughout each Complaint into each cause of action. Accordingly, each count emanates from, is based upon or arises out of facts that PRM knew (i.e., the embezzlement from Mitchell, the failure to supervise, the failure to seek recovery of the funds and the failure to perform statutorily imposed duties). PRM did not disclose this material information to Evanston in the Application. Accordingly, by the express terms set forth in the policies and the application signed by Ditteon, coverage was not available for the Mitchell suits.

Second, PRM and Ditteon knew that a guardian and personal representative were bound, as a matter of law, to follow the state statutes governing their appointment and service. *See e.g.,* Ind. Code § 29-1-10-3 and I.C. § 29-3-7-3. Ditteon and PRM took an oath before appointment as Mitchell's guardian and before they became the personal representative. They also had served as guardians and personal representatives of estates on prior occasions. (AOA, p. 93). Thus, Ditteon and PRM were not novices. They had been providing such services since 1995. (AOA, p. 93). The Indiana Guardianship statutes provide in part as follows:
IC 29-3-8-3 Mandatory responsibilities of guardian

Sec. 3. A guardian (other than a temporary guardian) shall do the following:

***25** (1) Act as a guardian with respect to the guardianship property and observe the standards of care and conduct applicable to trustees.

(2) Protect and preserve the property of the protected person subject to guardianship and secure the protective orders or other orders that are required to protect any other property of the protected person.

(3) Conserve any property of the protected person in excess of the protected person's current needs.

IC 29-3-8-4 Exercise of powers to perform responsibilities; enumeration

Sec. 4. A guardian (other than a temporary guardian) may exercise all of the powers required to perform the guardian's responsibilities, including the following:

(1) To receive and issue a receipt for property payable to the protected person or the protected person's parent, guardian, or custodian from any source, including any statutory benefit, insurance system, or any private contract, devise, trust, guardianship, or custodianship.

(3) To invest and reinvest the property of the protected person in accordance with powers vested in, and according to the standards imposed upon, trustees under IC 30-4-3-3(c)....

Likewise the Indiana Probate Code provides in pertinent part as follows:
IC 29-1-12-1 Classification of properties; appraisers; copies of inventories to interested persons

Sec. 1. (a) *Within two (2) months after his appointment,* unless a longer time shall be granted by the court, *every personal representative shall prepare a verified inventory* in one (1) or more written instruments, indicating the fair market value of each item of property of the decedent which shall come to his possession or knowledge, including a statement of all known, liens and other charges on any item.

(c) The personal representative shall furnish a copy of the inventory, or any supplement or amendment to it, to interested persons who request it, unless he has filed the original of the inventory, or any supplement or amendment to it, with the court.

***26 IC 29-1-13-1 Possession of property; duties of personal representative**

Sec. 1. Every personal representative shall have a right to take, and shall take, possession of all the real and personal property of the decedent. The personal representative:

(1) shall pay the taxes and collect the rents and earnings thereon until the estate is settled or until delivered by order of the court to the distributees;

IC 29-1-16-1 Personal liability, loss to estate

Sec. 1. (a) *Every personal representative shall be liable for and chargeable in his accounts with all of the estate of the decedent which comes into his possession at any time,* including all the income therefrom....

(c) *Every personal representative shall be liable for any loss to the estate arising from his* ***neglect*** *or unreasonable delay in collecting the credits or other assets of the estate* or in selling, mortgaging or leasing the property of the estate; *for* ***neglect*** *in paying over money or delivering property of the estate he shall have in his hands; for failure to account for or to close the estate within the time provided by this article;* for any loss to the estate arising from his embezzlement or commingling of the assets of the estate with other property; for loss to the estate through self-dealing; *for any loss to the estate arising from wrongful acts or omissions of his co-representatives which he could have prevented by the exercise of ordinary care; and for any other negligent or wilful act or nonfeasance in his administration of the estate by which loss to the estate arises.*

IC 29-1-16-4 Schedules; verification; certified public accountant

Sec. 4. *Accounts rendered to the court by a personal representative shall be for a period distinctly stated and shall consist of three (3) schedules, of which the first shall show the amount of the property chargeable to the personal representative; the second shall show payments, charges, losses and distributions; the third shall show the property on hand constituting the balance of such account, if any.*

***27** Thus, these statutes delineated PRM's obligations, and identified the liabilities associated with failure to perform. PRM and Ditteon knew whether they did or did not perform for Mitchell and his heirs.

Third, as noted above, prior to the appointment as guardian or personal representative, PRM and Ditteon had to take an oath to "faithfully discharge the duties of the guardian's trust according to law." *See,* I.C. § 29-3-7-3 and § 29 1-10-3. As such, they knew they had to inventory all assets, collect sums owed to the guardianship/estate, protect all the assets, monitor the assets, manage and invest the assets and provide a detailed accounting of the estate. Also, both as a Guardian and as a Personal Representative, PRM and Ditteon also knew they had a duty to file an accounting with the Court setting forth the assets collected, the expenditures made and the account balance. The Mitchell heirs asserted causes of action arising out of and based upon PRM's alleged acts and omissions under the statutes with respect to the assets of Charles Mitchell.

Based on the foregoing, the trial court correctly concluded that PRM and Ditteon objectively knew or should have known all facts concerning what they did or did not do to fulfill these legal obligations. PRM and Ditteon have provided no evidence to the contrary. The Mitchell Estate inventory was due sixty (60) days after PRM was appointed as personal representative. I.C. § 29-1-12-1(a). Accordingly, since PRM and Ditteon were appointed on May 7, 2008, the inventory was due on July 6, 2008. As the professionals hired to complete the requirements for the ward/estate, they knew whether they fulfilled the obligations. They cannot now come into court, play the "Sergeant Schultz" routine and claim they "know nothing."[3] ***28** Accordingly, PRM's *subjective* lack of knowledge argument must be rejected. *Worth,* 47 F.Supp.2d at 1896 (applying objective standard). *See also, Culver v. Cont'l Ins. Co.*, 11 Fed. App'x 42, 44-46 (4th Cir. 1999) (invoking "an objective standard of foreseeability" where the policy application asked whether the applicant knew "of any circumstance, act, error or omission that could result in a claim or suit") (Maryland law); *Prof 1 Managers, Inc. v. Fawer, Brian, Hardy & Zatkis,* 799 F.2d 218, 221, 224-225 (5th Cir. 1986) (concluding that prior knowledge provision in policy was not ambiguous and affirming summary judgment for insurer based on insured's failure to disclose "ticking bomb," of which the insured was aware before policy inception) (Louisiana law); *Cont'l Cas. Co. v. Graham & Schewe,* 339 F.Supp.2d 723, 727 (E.D. Va. 2004) (applying an objective standard to evaluate an insured's prior knowledge in a professional liability insurance case) (Virginia law); *Int'l Ins. Co. v. Peabody Int'l Corp.,* 747 F.Supp. 477, 482 (N.D. Ill. 1990) (noting that the policy did not call for a "judgmental or subjective evaluation" but instead "required in traditional objective language that the insured have no knowledge of such act, error or omission on the effective date of the policy indicating the probability of a covered claim.") (Illinois law); *Int'l Surplus Lines Ins. Co. v. Univ. of Wyo. Res. Corp.,* 850 F.Supp. 1509, 1521 (D. Wyo, 1994) *aff'd sub nom. Int'l Surplus Lines Ins. Co.* ***29** *v. Wyo. Coal Ref. Sys., Inc.,* 52 F.3d 901 (10th Cir. 1995) (applying objective standard and explaining that the prior knowledge exclusion "does not require that the person know that a claim has already been threatened, but only whether such a claim could reasonably be anticipated in the future" (footnote omitted)) (Wyoming law). Therefore, the trial court correctly concluded the misrepresentation in the 2009 application (incorporated into both Policies), the failure to disclose the existence of wrongful acts prior to the issuance of the Policies and the known loss rule all precluded coverage for the Mitchell suits.

D. The Policies Unambiguously Limited Coverage To PRM's "Professional Services" As Court Appointed Guardians.

PRM and Ditteon argue the trial court erred by concluding the policies only covered services as "court appointed guardians." They further suggest the insurance policies provided coverage for all professional services rendered by PRM and Ditteon. (Appellants' Brief, pp. 26-28). PRM and Ditteon make this argument based upon the policy language that incorporates the application and the representations made therein. Although they are correct that the application was made part of the Policies, the Policies unambiguously provides that the coverage is provided only for the "Professional Services" identified in Item 4. of the Declaration's page. (AOA, pp. 273, 279, 305-33, 413-37). The Policies definitions provide, in relevant part, as follows.

J. Professional Services means those services stated in Item 4. of the Declarations rendered for others for a fee.

The Declaration's page, Item 4. reads, in full, as follows:
Professional Services: “Court Appointed Guardians”

(AOA, pp. 273, 279, 306, 314, 414, 422).

Contrary to the suggestion made by PRM and Ditteon, the Policies does not provide that the definition of “Professional Services” is further set forth in the insured's Application. ***30** Reasonable persons with the ability to read could not disagree as to how the Policies define “Professional Services.” *Briles v. Wausau Ins. Co.*, 858 N.E.2d 208, 213 (Ind. Ct. App. 2006) (a court must give policy language its plain and ordinary meaning). Insurers are free to limit their risk absent public policy and Indiana courts have recognized that insurers have properly limited their coverage in “claims made” policies. *Ashby v. The Bar Plan Mut. Ins. Co.*, 949 N.E.2d 307, 312 (Ind. 2011); *Paint Shuttle*, 733 N.E.2d at 522. Therefore, the trial court correctly rejected this argument and properly granted summary judgment to Evanston.

PRM and Ditteon attempt to avoid this unambiguous language by arguing that they reasonably believed that coverage would exist for all services. This argument must be rejected for several reasons. First, the language of the Policies is not ambiguous. As set forth above, the Policies provided coverage for “Professional Services” rendered as “Court Appointed Guardians.” Thus, PRM and Ditteon's reasonable expectations regarding coverage for estate services is irrelevant. *New Welton Homes v. Heckman*, 830 N.E.2d 32, 35 (Ind. 2005). Second, PRM and Ditteon had an obligation to read and review the Policies. *Safe Auto Ins. Co. v. Enterprise Leasing Co. of Indianapolis, Inc.*, 889 N.E.2d 392, 397 (Ind. Ct. App. 2008). They were reminded of this obligation by their agent, Kinnaman. (AOA, pp. 206, 215-16). A reading of the Policies would have revealed the scope of the coverage provided. Therefore, the trial court reached the correct conclusion.

E. The Policies Do Not Apply To PRM's “Professional Services” That Pre-Date The July 15, 2009 Inception And Retroactive Dates Of The Policies.

PRM and Ditteon next challenges the trial court's determination that coverage was not available for matters that predate the Policies. In essence, they ask the court to ignore the express time restrictions and provisions of the claims made and reported policies. (Appellants' Brief, pp. 29-32). PRM and Ditteon suggest that because the Mitchell heirs claimed the guardian ***31** continued to owe a duty to properly account, marshal and manage the assets of Charles Mitchell and since Ditteon was never discharged by the guardianship court, that the claims arose out of an ongoing act or a continuing wrong which overlapped the Policy coverage time period. (*Id.*) At first blush and without referring to the Policies language or Indiana case law, this argument is supported by a thin reed.

PRM and Ditteon fail to acknowledge that the Policies are “Claims Made and Reported” and provide as follows:
A. The Company shall pay on behalf of the Insured all sums in excess of the Deductible amount stated in Item 6. of the Declarations, which the Insured shall become legally obligated to pay as Damages as a result of *a Claim first made against the Insured* during the Policy Period or during the Extended Reported Period, if exercised, and reported to the Company during the Policy Period or the Extended Reporting Period, if exercised, or *within sixty (60) days after the expiration date of the Policy Period or Extended Reporting Period*, if exercised.

by reason of:

1. a *Wrongful Act;* or

2. a Personal Injury; *in the performance of Professional Services* rendered or that should have been rendered by the Insured or by any person or organization for whose Wrongful Act or Personal Injury the Insured is legally responsible.

provided:

(i) *the Wrongful Act* or Personal Injury *happens during the Policy Period* or on *or after the Retroactive Date* stated in Item 7. of the Declarations and *before the end of the Policy Period;* and

(ii) prior to the effective date of this policy *the Insured had no knowledge of such Wrongful Act or Personal Injury or any fact, circumstance, situation or incident which may have led a reasonable person in the Insured's position to conclude that a Claim was likely.* (Emphasis added).

(App., pp. 103, 127).

***32** Accordingly, the Claim(s) had to be (1) made and reported; (2) during the policy period or on or after the retroactive date stated in Item 7. (i.e., July 15,2009); (3) by reason of a wrongful act/personal injury; (4) in performance of "Professional Services;" (5) the wrong/injury had to happen during the policy period; and (6) prior to July 15, 2009, the insured had no knowledge of any fact that might lead to a likely claim. Thus, the continuing duty analysis does not survive a cursory review of the language of the Policies. In fact, under a claims made policy, claims for breach of a continuing duty are deemed to arise on the date the wrong/injury first occurred and cannot trigger coverage under a claims made policy issued at a later date. *See e.g., Truck Ins. Exch.,* 951 F.2d at 791 (applying Indiana law) (recognizing that claims based on conduct preceding policy is uncontroversially and properly excluded from coverage under a claims made and reported policy). *See also, SCA Services, Inc. v. Transportation Ins. Co.,* 419 Mass. 528, 646 N.E.2d 394, 397-98 (1995) (an insured cannot insure against consequences of an event which has already occurred.); *Cahow,* 192 P.3d at 622 ("insured cannot obtain coverage for the risk of a known loss."). Thus, PRM's "thin reed" breaks and does not support their argument. But, there are additional reasons to reject PRM's argument.

Here, the guardianship was opened in 2006. (AOA, pp. 278, 385). The duty to marshal, manage, account and protect assets existed on that date. The guardianship effectively terminated in May 2008 when Mitchell died. (AOA, pp. 282, 438-42). The estate was opened and PRM was appointed as the personal representative. (Id.). While some final obligations as guardian may have existed from that point forward, PRM thereafter wore the hat of a personal representative of the estate. The duties of the personal representative of the estate overlapped and were duplicative of the guardian's duties. To claim that PRM continued to perform under both hats is a self-serving fiction that was properly rejected by the trial court. In fact, PRM's activities ***33** would have been compensated solely in the capacity of a personal representative, not as a guardian from that point forward. (AOA., pp. 34-60); (Parke County CCS, indicating no petition for guardian fees after the estate was opened.). Finally, it is undisputed PRM and Ditteon were aware of facts that might support a claim prior to issuance of the Evanston policies.

The 2009 Evanston Policy was not issued to PRM until July 15, 2009, which is also the retroactive date of the Policies. Certainly, the obligation to complete the transfer of duties from guardian to personal representative could or should have been done well before that date, as the estate was opened in May of 2008. If not, then PRM knew that a breach of their duties existed, could support a suit by Mitchell and did not disclose the potential claim to *Evanston. See e.g., Koransky,* 712 F.3d at 341.

In *Koransky,* the law firm knew of facts regarding a potential claim by a client before a 2006-2007 claims made insurance policy expired and a 2007-2008 Policy became effective. The court determined that since the firm did not notify the insurance carrier before the effective date of the renewal Policy, coverage was precluded by the express terms of the Policy, which required the law firm to notify the carrier and disclose facts or circumstances which might support a Claim. *Id.*

Certainly, under the "reasonable professional" standard, and as a seasoned provider of guardian and personal representative services, PRM knew or should have known their employee's embezzlement and the failure to timely complete statutorily

imposed duties might support and lead to a claim by Mitchell or his heirs. *Id. See also, Worth,* 47 F.Supp.2d at 1099-1100 (attorney had reasonable basis to believe that he had breached a professional duty at time of application that precluded coverage with a claims made policy); *Inlow v. Henderson, Daily, Withrow & DeVoe,* 787 N.E.2d 385, 395 (Ind. Ct. App. 2003), *trans. denied,* (noting probate ***34** code seeks prompt resolution of claims and estate administration). Also, as set forth in the Policies, no coverage exists for wrongful acts and injuries pre-dating the inception of the Policy. *Worth,* 47 F.Supp.2d at 1099 (holding insurer properly refused to defend and indemnify where insured failed to disclose known facts of potential claim occurring prior to purchase of claims made policy). Therefore, the trial court correctly concluded no coverage or defense was owed for the claims asserted against PRM and Ditteon by Mitchell' s heirs, as the facts supporting the claims necessarily happened and first occurred prior to July 15, 2009.

F. The Trial Court Properly Determined That No Coverage Existed Under The 2009 Policy, As No Claim Was Made Before July 15, 2010 And PRM Did Not Comply With The Discovery Clause Of The Policy.

PRM and Ditteon admit they did not submit a "Claim" prior to July 15, 2010. Instead, they claim to have submitted notice of a "potential claim" and, under the 2009 Policy "Discovery Clause," are entitled to coverage under that section of the 2009 Policy. (Appellants' Brief, pp. 32-34). PRM and Ditteon are again mistaken. As set forth in the 2009 Policy and the coverage correspondence sent by Evanston, PRM had to supply, in writing, during the policy period, specific additional information to obtain the benefit of the discovery clause. PRM did not do so. (AOA, pp. 284-86, 334-42, 375-84). PRM suggests that the Evanston log notes suggest that the discovery notice clause had been fulfilled and that the provision of the notice of the lawsuits in October 2010 complied with the discovery clause requirements. (Appellants' Brief, p. 33). However, the log notes cannot override the terms of the Policies or Evanston's coverage correspondence with PRM. PRM did not provide all information required within the proper period allowed. Furthermore, provision of the copies of the complaints occurred more than sixty (60) days after the 2009 Policy expired. (AOA, pp. 278, 385). The 2009 Policy only allowed for the reporting of potential claims during the policy period; there is no extension for the reporting ***35** of potential claim circumstances under the Discovery Clause beyond the policy period. (AOA, p. 232). Also, the submission made by PRM was the actual Claim asserted by the Mitchell heirs. Provision of the Claim after the policy period of a claims made and reported policy, *ipso facto* cannot meet the requirement to provide information under the discovery clause during the policy period. *Paint Shuttle, Inc.,* 733 N.E.2d at 521-22 (provision of notice is condition precedent and must be given within policy time period). As such, PRM and Ditteon did not comply with the Discovery Clause and the 2009 Policy does not provide them coverage. Therefore, this Court should affirm the trial court's decision.

G. The Trial Court Correctly Concluded No Question Of Fact Existed As To Exclusions 0, P or R.

PRM and Ditteon next attempt to argue the trial court erred because Exclusions O, P and R are ambiguous and, alternatively that if they are not ambiguous, that factual disputes existed precluding summary judgment. (Appellants' Brief, pp. 34-38). PRM and Ditteon admit that their employee, Jan Riddle, embezzled guardianship funds. (Appellants' Brief, p. 7). Exclusion 0 precludes claims based upon or arising out of "conversion, misappropriation, commingling of or defalcation of funds or property." (App., pp. 96-143). Part of the allegations of the Mitchell lawsuits were based on or arose out of such conduct, i.e., Riddle embezzlement, PRM's negligent supervision and failure to seek recovery. These allegations were incorporated into each lawsuit asserted by the Mitchell guardianship/estate. Contrary to PRM's suggestions, failure to supervise and to seek recovery of the funds from Riddle were "based upon" and "arose out of" such excluded conduct. *See e.g., Bankers Multiple Line Ins. Co., Inc. v. Pierce,* 20 F.Supp.2d 1004, 1006-07 (S.D. Miss. 1998) (exclusion of claims arising out of misappropriation of funds also excluded claim for negligent supervision). Therefore, the trial court properly determined this exclusion precluded coverage.

***36** The trial court also properly applied Exclusion P. The allegations of Mitchell's claim reference "failure to collect or pay monies" and "failure to collect or pay federal, state or local tax." The Mitchell complaints allege PRM and Ditteon failed to seek collection of the embezzled funds and they cannot dispute this fact. The complaints also alleged the correct taxes were not calculated and paid. Again, this fact cannot be disputed by PRM and Ditteon. This allegation was incorporated into every

Mitchell cause of action. No ambiguity exists in the exclusion and no dispute exists regarding the facts. Therefore, the trial court's summary judgment should be affirmed based on Exclusion P.

Finally, Exclusion R was properly applied by the trial court as it excluded coverage for Claims "based upon or arising out of the preparation of a financial statement, if a compilation, review or audit; or the performance of any analytical analysis for the purpose of preparing a financial statement." PRM and Ditteon suggest that since the terms "financial statement" are not defined by the Policies and because there is no mention of financial statements made in the context of a guardianship or an estate, that the exclusion was ambiguous. (Appellants' Brief, p. 37). However, the lack of a definition in the Policies do not automatically render them ambiguous. The term "accident" in occurrence based liability policies is not defined, but courts have defined it according to its implicit, ordinary and unambiguous meaning. *Sheehan Constr. Co., Inc. v. Cont'l Cas. Co.*, 935 N.E.2d 160, 170 (Ind. 2010). As the Indiana Supreme Court noted in *Sheehan:*
When the language of an insurance contract is clear and unambiguous, we will assign to the language its plain and ordinary meaning. Id. An insurance policy that is unambiguous must be enforced according to its terms, even those terms that limit an insurer's liability. *Ramirez v. Am. Family Mut. Ins. Co.*, 652 N.E.2d 511, 514 (Ind.Ct.App. 1995). Thus, we may not extend insurance coverage beyond that provided by the unambiguous language in the contract. *Shelter Ins. Co. v. Woolems.* 759 N.E.2d 1151, 1155 (Ind.Ct.App.2001), trans. denied. Also, insurers have the right to limit their coverage of risks and, therefore, ***37** their liability by imposing exceptions, conditions, and exclusions. *Allstate Ins. Co. v. Boles*, 481 N.E.2d 1096, 1098 (Ind. 1985).

As indicated earlier Insurers' CGL policies insure against liability for "property damage" caused by an "occurrence." In turn the policies define "occurrence" as "an accident, including continuous exposure to substantially the same general harmful conditions." The term "accident" is not defined in the policies. However, this Court has defined accident to mean "an unexpected happening without an intention or design." *Tri- Etch, Inc. v. Cincinnati Ins. Co.*, 909 N.E. 2d 997, 1002 (Ind. 2009) (quoting *Auto-Owners Ins. Co. v. Harvey*, 842 N.E.2d 1279, 1283 (Ind.2006)). Implicit in the meaning of "accident" is the lack of intentionality. *Id.*

Id. at 169-70.

Accordingly, when a term is undefined in a policy, the court will apply its usual and customary definition. *Argonaut Ins. Co. v. Jones*, 953 N.E.2d 608 (Ind. Ct. App. 2011) *trans. denied.* A "Financial statement" is defined as follows:
Noun 1. Financial statement - a document showing credits and debits. (Obtained from, "THEFREEDICTATIONARY,http://www.the freedictionary.com/financial statement (last visited Dec. 7, 2012)).

No restriction is placed on the use, purpose or context of the financial statement in this definition or the policies. Thus, as long as the item includes a reference to debits and credits (assets/liabilities) of the entity or person, it is considered a financial statement.

Here, in the context of either the guardianship or the estate, that is exactly what is to be created by the guardian or the personal representative of an estate. In essence, the statutorily required accounting is an itemization of the assets and liabilities of the ward/decedent (i.e., debits and credits). The accounting and inventory sets forth the debits and credits of a guardianship or estate. As set forth in the Mitchell lawsuits, that inventory and accounting were what PRM and Ditteon were alleged to have not done properly. Therefore, the trial court correctly applied Exclusion R as it precluded coverage for the claims asserted against PRM and Ditteon.

***38 H. The Trial Court Properly Determined Evanston's Investigation Of The Mitchell Claims Does Not Constitute Bad Faith As A Matter Of Law.**

PRM argues that the trial court erred in granting summary judgment on the bad faith claim, because Evanston did not conduct a more thorough investigation of the Mitchell claims. (Appellants' Brief, pp. 38-40). The only case PRM cites to support this

argument is *Erie Ins. Co. v. Hickman,* 622 N.E.2d 515 (Id. 1993). However, PRM makes no effort to explain how the Erie decision applies or requires the court to deny summary judgment. Instead, PRM simply asserts that Evanston should have conducted additional investigation into the Mitchell claims. PRM cites no case that requires the insurance company to do a more thorough investigation. Why? Because the case law does not support PRM's position. In fact, no heightened coverage investigatory requirement exists. As the Indiana Supreme Court indicated in *Erie*, "the lack of a diligent investigation alone is not sufficient to support an award for bad faith." *Id.* at 520 (citation omitted). *See also, Worth,* 47 F.Supp.2d at 1102.

In *Worth,* the insured made an argument very similar to the one being made by PRM. The insured argued that the district court's summary judgment in favor of the insurer should be denied because the insurer declined coverage after a limited investigation. The facts reflected that, as in this case, the insurer conducted an investigation, examined the Policy, examined the claim and provided a written explanation to the insured delineating the reasons coverage was denied. *Id.* at 1101-02. The Court opined as follows:

Additionally, Worth alleges that defendants' investigation was not sufficiently exhaustive, which evidences bad faith and demonstrates their breach of an implied covenant of good faith and fair dealing. See Pl.'s Am.Compl. ¶ 9. However, Worth's claim gauntly starves from a barren record, as Worth has adduced no evidence remotely suggestive of defendants' bad faith in refusing to defend Worth against Clock's malpractice claim.

***39** The Indiana Supreme Court has held that "the lack of diligent investigation alone is not sufficient to support an award" for bad faith. *Erie,* 622 N.E.2d at 520. "[A] good faith dispute about... whether the insured has a valid claim at all will not supply the ground for a recovery in tort for the breach of the obligation to exercise good faith... even if it is ultimately determined that the insurer breached its contract." *Id.* An insurer may be considered to have acted in bad faith where it "denies liability knowing that there is no rational, principled basis for doing so." *Id* Yet, poor judgment or negligence do not amount to bad faith since the "additional element of conscious wrongdoing must also be present." *Colley v. Indiana Farmers Mut. Ins. Group,* 691 N.E.2d 1259,1261 (Ind.Ct.App.1998).

Worth offers no evidence whatsoever that Worth(sic) acted in bad faith when defendants investigated his claim and refused to defend him in Clock's malpractice action. Defendants twice provided Worth with unambiguous written notices that they would not provide him a defense and the rationale for not doing so. As we have explained above in detail, defendants' basis for excluding the malpractice action from policy coverage not only was rational and principled, but also was correct as a matter of law. Thus, Worth has failed to demonstrate a triable issue of material fact with respect to his claim that the defendants acted in bad faith in investigating and denying his claim for policy coverage.

Id. at 1101-02.

Here, as in *Worth,* it is undisputed that Evanston assigned review to a person with law degree and prior guardianship claims experience who examined the notice of claim, examined the policies, discussed the same with the insured and the insured's counsel and provided not two, but three (3) written explanations of the reasons for Evanston's coverage position. (AOA, pp. 276-78, 283, 334-42, 375-84, 486-94). Furthermore, Evanston went one step further than the insurer in *Worth,* as Evanston in each coverage letter gave PRM and their counsel the opportunity to provide additional facts and materials that would alter the analysis or result in reconsideration of the denial of coverage. *(Id.).* PRM and Ditteon, however, did not advise Evanston of any alleged inadequacy with its coverage investigation until it filed its summary judgment answer brief.

Contrary to PRM and Ditteon's suggestion, Evanston did not ignore or abandon its obligations. Although they suggest that the investigation by Evanston should have also included ***40** a discussion with the guardianship attorney, and also should have included additional discussions with Ditteon and counsel after each notice was sent, PRM and Ditteon admitted in their summary judgment response brief that each notice and complaint provided to Evanston were "virtually identical". (Appendix, pp. 324). Interestingly, PRM now attempts to argue that the "virtually identical" claims were different and should have led to additional investigation and a different coverage determination. (Appellants' Brief, p. 39). PRM, however, has not explained how

additional communications or further investigation would have changed the analysis and has not provided clear and convincing evidence of an evil state of mind. *Masonic Temple Ass'n. of Crawfordsville v. Ind. Farmers Mut. Ins. Co.*, 779 N.E.2d 21, 26 (Ind. Ct. App. 2002), *reh'g denied. See also, Kartman v. State Farm Mut. Auto Ins. Co.*, 634 F.3d 883, 890-91 (7th Cir. 2011) *cert. denied*, 132 S.Ct. 242, 181 L.Ed.2d 138 (U.S. 2011). Rather, PRM and Ditteon relied only on the level of the investigation by Evanston. Therefore, as in *Worth* and *Erie*, PRM and Ditteon's arguments on the bad faith claim failed as a matter of law.

Undisputedly, PRM and Ditteon knew of the loss, did not disclose the potential for a claim and made misrepresentations in the application. These facts would not have changed regardless of any additional investigation. Also, the date of Mitchell's death and the statutory transfer of duties from the guardian to personal representative are both undisputed. Finally, PRM and Ditteon fail to indicate or explain why they did not respond to any of Evanston's coverage letters or provide any additional information for review and consideration by Evanston. If they believed additional investigation would have supported coverage, then PRM and Ditteon should have submitted that information to Evanston.

PRM and Ditteon lastly suggest that Evanston's failure to immediately seek a declaratory judgment regarding its denial demonstrated bad faith. (Appellants' Brief, p. 40). They are ***41** mistaken. The present matter undisputedly includes a counterclaim by Evanston against PRM and Ditteon for declaratory judgment with respect to the Evanston policies. The fact that PRM and Ditteon won the race to the courthouse does not alter the fact that a judicial determination of Evanston's obligations under the policies has been requested.

Here, Evanston denied coverage and invited PRM and Ditteon to submit further information as to its coverage declination. Instead of submitting additional information, PRM and Ditteon filed this action which included coverage and bad faith claims against Evanston; in response, as a compulsory counterclaim under Indiana Trial Rule 13, Evanston filed its counterclaim for declaratory judgment on July 8, 2011. (Evanston's Answer). Evanston's counterclaim seeking a declaratory judgment on the policies was filed well in advance of PRM and Ditteon's settlement with the Mitchell estate and the dismissal of the underlying litigation in or around May of 2012. (AOA, pp. 99,146-193). Given these undisputed facts, Evanston can assert its coverage defenses, including its grounds for refusing to defend. *Tri-Etch, Inc. v. Cincinnati Ins. Co.*, 909 N.E.2d 997, 1001, n.2 (Ind. 2009) (noting an insurer can assert coverage defenses even if it chooses to neither defend nor seek a declaratory judgment). Furthermore, in seeking counter declaratory relief before adjudication or dismissal of the underlying litigation Evanston precluded PRM and Ditteon from seeking an estoppel of coverage defenses. *See e.g., Liberty Mut. Ins. Co. v. Metzler*, 586 N.E.2d 897, 901 (Ind. Ct. App. 1992) (insurer will not be estopped from asserting coverage defenses if declaratory judgment is sought before a judgment in the underlying action is entered). Accordingly, Evanston properly asserted any and all of its coverage defenses and was entitled to declaratory relief pursuant to its counterclaim which, as a matter of law, necessarily trumps any claim of bad faith.

***42** Finally, PRM and Ditteon have provided no evidence that would enable the court to conclude there was "no legitimate basis for denying liability." *Friedline v. Shelby Ins. Co.*, 774 N.E.2d 37, 40 (Ind. 2002). Bad faith arises only when an insurer wrongfully denies a claim and knows there is "no rational, principled basis" for doing so. *Mahan v. Am. Stnd. Ins. Co.*, 862 N.E.2d 669, 677 (Ind. Ct. App. 2007) (holding bad faith requires evidence of a state of mind reflecting dishonest purpose, moral obliquity, furtive design or ill will).

As noted above, Evanston did more than the insurance company in *Worth.* In each communication Evanston gave PRM and Ditteon and their counsel the opportunity to provide additional facts and materials that would alter the analysis or result in a reconsideration of coverage. Contrary to their suggestion, Evanston did not simply ignore or abandon its obligations, but rather was open to considering further information. Significantly, PRM, Ditteon and their counsel provided no other evidence that would support coverage under the policies and submitted no other evidence to the trial court that would support a claim for bad faith. Accordingly, as in *Worth*, Evanston's basis for denying coverage "was not only rational and principled, but also correct as a matter of law." *Worth*, 47 F.Supp.2d at 1102. Furthermore, even if the Court concludes that coverage might exist for PRM (which it should not), since Evanston's coverage position was reasonable, the trial court properly granted summary judgment as a matter of law on the bad faith claim. *Eli Lilly and Co. v. Zurich Am. Ins. Co.*, 405 F.Supp.2d 948, 958 (S.D.

Ind. 2005). Therefore, this court should affirm the entry of summary judgment in favor of Evanston and against PRM on the claim for bad faith.

*43 VII. CONCLUSION

Wherefore, based upon the foregoing arguments and authorities, Evanston respectfully requests this Court affirm the trial court's entry of summary judgment in its favor and grant all other just and proper relief.

Footnotes

1 The Appendix of Appellee will be referred to as “AOA”. Appellants' Appendix will be referred to as “App.”

2 Here, the Evanston policies are claims made and reported policies. A claims-made policy provides coverage for claims first made during the policy period. 2 Allan D. Windt, *Insurance Claims & Disputes*, §11:5 at 357 (4th Edition 2001). There are several types of claims-made policies. Barry R. Ostrager and Thomas R. Newman, *Insurance Disputes*, §4.02[b] at 164 (15th Edition, 2011) (“Ostrager and Newman”) By the provisions quoted above, the Evanston policies require that claims be both made and reported during the policy period. A “claims-made and reported” policy requires not only that the claim be first made during the policy period, but also that it be reported to the insurer during the policy period. *Id.* at 165. PRM fails to consider this important difference in challenging the trial court's decision. *See e.g.*, *Meridian Mut. Ins. Co. v. Purkey*, 769 N.E.2d 1179, 1188 (Ind. Ct. App. 2002) (“[C]ourts must recognize the fact that there are different insurance policies on the market for different purposes.” *quoting* *Erie Ins. Group v. Alliance Envtl. Inc.*, 921 F.Supp. 537, 542 (S.D. Ind. 1996), *aff'd* 102 F.3d 889 (7th Cir. 1996)).

3 In *Ind. Dept. of State Revenue v. Safayan*, 654 N.E.2d 270, 274 (Ind.1995), the Indiana Supreme Court explained the “Sergeant Schultz” defense:

“The Sergeant Schultz defense refers, of course, to the refrain of the character by that name in the television comedy, *Hogan's Heroes.* Sergeant Schultz was assigned the unenviable task of guarding Colonel Hogan and his men in a German prisoner of war camp during World War II. Each week, despite the best efforts of the camp's commandant, Colonel Klink, the ‘prisoners' would successfully conduct espionage operations from inside the prison. And each week, the lovable, if incompetent, sergeant would stumble upon some clue to Hogan's activities. Instead of pursuing these leads, however, Schultz would simply declare, “I know n-o-t-h-i-n-g, n-o-t-h-i-n-g.” *Cf. Ortho Pharm. Corp. v. Sona Distrib., Inc.*, 663 F.Supp. 64, 66 (S.D.Fla.1987) (rejecting Sergeant Schultz defense to fraudulent misrepresentation claim). See also, *Kennedy v. Guess, Inc.*, 806 N.E.2d 776, 786, n. 5 (Ind., 2004)”. Also, this concept has existed a long time in the latin maxim, “Ignorantia legis neminem exusat,” i.e., ignorance of the law does not excuse. *State v. Mut. Life Ins. Co. of New York*, 175 Ind. 59, 93 N.E. 213, 223 (1910).